When the Judge Met P: The Rules of Engagement in the Court of Protection and the Parallel Universe of Children Meeting Judges in the Family Court

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Abstract:	The importance of the subject of litigation being able to tell their story directly to the decision maker is widely recognised as offering therapeutic benefits to all involved in the decision making process. The Court of Protection makes life changing decisions for individuals on health and welfare matters, and it is clearly critical that the person at the centre of those proceedings (known as 'P') is given the opportunity for 'direct engagement' with the judge deciding their case. This article interrogates the under explored domain of the prevalence and forms in which 'P' has engaged directly with the judge (particularly by meeting with the judge without giving formal evidence) with the aid of a database of over 200 'health and welfare' judgments. An integrated approach is adopted, drawing from these judgments, but also cross-referencing the far more advanced literature and case law on children meeting judges in the Family Court to explore some of the issues. This paper finds that the transplantation of practices from the Family Court to the Court of Protection has been problematic, has sometimes obscured P's direct contact with the judge in their own case and jars with recent moves in the Court of Protection towards modelling empathetic judging and 'standing in P's shoes'.

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Introduction

In 2015 Justice Peter Jackson (as he then was), a Court of Protection ('CoP') judge, decided whether it would be lawful to proceed with a life-saving leg amputation against the wishes of the patient (Mr B). Mr B was 'proud' and 'fiercely independent' and had told the judge that he was not afraid of dying - the angels had already told him he would be going to heaven.[1] Peter Jackson J spoke of meeting Mr B in the following terms:

> 'given the momentous consequences of the decision either way, I did not feel able to reach a conclusion without meeting Mr B myself. There were two excellent recent reports of discussions with him, but there is no substitute for a face-to-face meeting where the patient would like it to happen'. [2]

As *Wye Valley* illustrates, the CoP's jurisdiction under the Mental Capacity Act 2005 (MCA) is one of 'profound importance.'[3] Life changing 'health and welfare' decisions are made regarding whether P has the capacity to make his or her own decisions on matters as transformative as whether they should live in the family home or in residential care, and whether life sustaining treatment should be continued or withdrawn. Despite the words of the judge set out above, and exhortations from other CoP judges encouraging their contemporaries to meet with P[4], this article will show that such meetings have been rare and that the *direct* voice of P has apparently often been absent from these life changing judgments. Amendments to the CoP Rules in 2015 signal a bold attempt to focus attention on the participation of those at the centre of hearings[5], but as with the parallel guidance offered to judges meeting children, the option of a meeting with the judge outside the courtroom is framed as a matter of 'discretion'.[6]

Although P being able to tell their story directly to the decision maker (referred to here as 'direct engagement') may occur in the context of P either giving 'information' or 'evidence' to the court, or

[1] *Wye Valley NHS Trust v B* [2015] EWCOP 60, [21] and [37].
[2] Ibid [18].
[3] *A Local Authority v AB* [2016] EWCOP 41, [5].
[4] *Re CD* [2015] EWCOP 74 at [31] and *Re M* [2013] EWCOP 3456, [42].
[5] CoP Amendment Rules 2015 (SI 548/2015) inserting a new Rule 3A into the CoP Rules 2007.
[6] See A. Daly making this point eloquently in the case of children in *Children, Autonomy and the Courts: Beyond the Right to be Heard.* (Brill, 2018) chapter 4 , 199.

in the specific context of P meeting and talking to the judge, it is the latter which is the main focus of this paper.[7] An integrated approach to the scrutiny of direct engagement is adopted, observing practice through the lens of published CoP judgments, whilst also cross-referencing the far more developed literature and jurisprudence on judges meeting the child in Family Court proceedings to illuminate some of the issues. What emerges from this analysis is: a) uncertainty regarding the extent to which rules developed in the Family Court apply to the adult jurisdiction of the CoP; and b) mixed messages in judicial narratives in terms of whether an impermeable barrier can and ought to be maintained between a meeting with P and the 'grounds' for the decision.

After first exploring the value of direct engagement and then examining its endorsement (or otherwise) in the parallel jurisdictions of the Family Court and CoP, this paper examines the prevalence of direct engagement in the broad sense (i.e. including giving evidence or information in person or meeting with the judge) in the CoP, before offering a closer textual analysis of CoP judgments where the judge has met with P, or this particular option has been discussed. The concluding discussion argues that judges and practitioners should not too readily assume that the Family Court model's approach to hearing from children, which does not recognise presumptions in favour of direct engagement, is appropriate or desirable when it comes to judges meeting with P.

1. THE VALUE OF 'DIRECT ENGAGEMENT': THERAPEUTIC JURISPRUDENCE IN THE COP?

The benefits of the subject of proceedings engaging *directly* with the court resonate strongly with therapeutic jurisprudence ideals. The 'therapeutic jurisprudence'(TJ) movement, founded by Bruce Winick and David Wexler almost 30 years ago[8], produced a body of literature of galactic proportions with an international following. Its aim was to develop awareness of, and make explicit, the therapeutic contributions of law and legal procedures. The research it generated emphasises the harms

[7] Rather than a broader view of participation which includes what might be called 'indirect engagement' or engagement at a distance, e.g.'representation' of P through lawyers, intermediaries, etc. - see, e.g. the excellent report by L. Series et al, *The Participation of P in Welfare Cases in the Court of Protection.* (2017) (available at http://sites.cardiff.ac.uk/wccop/new-research-report-the-participation-of-p-in-welfare-cases-in-the-court-of-protection/) which examines many different elements of 'participation.'

[8] D. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1991) and D. Wexler and B. J. Winick, *Judging in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996).

caused by exclusion and alienation by legal processes and the therapeutic benefits of 'inclusion, being given a meaningful voice and being treated as integral' to the proceedings.[9]

Amy Ronner's three 'V's ('voice', 'validation' and 'voluntariness') as hallmarks of therapeutic judging have become a subframe of reference within TJ, and are adapted for the purposes of this analysis.[10] According to Ronner, 'voice' entails the opportunity to tell one's story to the decision maker.[11] Voice can, of course, be achieved through representation, but there is growing recognition of the importance of direct engagement with the decision maker, and a preference for the voice of the subject being heard 'directly' can be identified in TJ work.[12] Direct engagement might be preferred to, or at least regarded as a valuable addition to, participation which is exclusively at a distance (i.e. through a representative) for a number of reasons. In both child and adult jurisdictions, concerns have been expressed that the professional relaying of the subject's wishes and feelings offers a 'filtered' and sometimes 'misinterpreted' account.[13] The Court of Appeal in *Re W* referred to the child's account being 'finessed away' by the CAFCASS officer's 'own analysis.'[14] Hunter, however, staunchly critiques the idea that meeting the child somehow provides the judge with an authentic, unfiltered account.[15] Indeed, in *Wye Valley* itself the judge remarked that a nurse had been present and 'had been invaluable in helping him understand everything Mr B wanted to say.'[16] Even this meeting was therefore not 'unfiltered,' and as such meetings take place against the background of the evidence presented in court, there is no real sense of judges seeing P in cognitive isolation from the rest of the case. But recognising that nothing is 'unfiltered' or uncontaminated by other influences does not of itself negate the added value of these meetings, which can contextualise, 'supplement and

[9] I. Freckleton, 'Death Investigation, the coroner and therapeutic jurisprudence.' (2007) 15 *Journal of Law and Medicine* 1.
[10] A. Ronner, 'Songs of Voice, Validation and Voluntary Participation.' (2002) 71 *Uni Cin L Rev* 89 at 95 and A. Ronner, 'The Learned Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome.' (2008) 24 *Touro L Rev* 601 at 628.
[11] K. Burke, 'Just what made drug courts successful?' (2008) 36 *New England Journal on Criminal and Civil Confinement* 39 at 54.
[12] S. Leben, 'Thoughts on the Judge's Written Work.' (2014) published proceedings of American Judges Association conference available at amjudges.org/conferences/2014Annual/ConferenceMaterials/ZQ-**Leben** (accessed 2.7.18).
[13] P. Parkinson and J. Cashmore, 'Judicial Conversations with Children (chapter 7)' in *The Voice of a Child in Family Law Disputes* (OUP, 2008) at 162 and see also J. Caldwell, 'Common law judges and judicial interviewing.' (2011) 23 CFLQ 41.
[14] *Re W* [2008] EWCA Civ 538 at [28-29].
[15] R. Hunter, 'Close Encounters of a Judicial Kind.' (2007) 19 CFLQ 204.
[16] *Wye Valley* (n1) [18].

illuminate'[17] the evidence before the court. The importance of the subject of proceedings being able to tell their story *directly* to the decision maker is now reflected in Article 6 jurisprudence which has generated what Lucy Series calls a rule of 'personal presence.'[18]

Ronner's second 'V' of 'validation,' entails that subjects should feel listened to, for if they do, they are more likely to feel that they have truly participated in the decision and prosper.[19] 'Listening' to P requires courts to emphasise a *subjective focus* on [P's] 'understanding of events or actions' and seek to 'listen to and understand [P's] view of the world'.[20] The practice of meeting P itself conveys positive validating messages, for example, that the judge is sufficiently interested in the person, that the job of making the decision is so important that it cannot be delegated and that the judge is not willing to simply 'rubber stamp' expert reports.[21] Encounters between the judge and P (where they happen) are frequently reflected in ritualised validatory narratives. The judge may report on P's capacity to concentrate, their courteousness,[22] articulateness[23] and intelligence. The subject of proceedings in *Lincolnshire CC v K* was described as having: '…a good command of language structure and vocabulary and …pleasant interpersonal skills. She also demonstrated throughout the hearing a great degree of concentration and attention.'[24] In *Re Z* the judge commented on P's attire ('[S]he was suitably and smartly dressed'), her demeanour (she 'gave evidence in a calm and measured way') and her believability ('[g]iven her learning difficulties, I was surprised by the sophistication of some of her answers, although acknowledge that this may have been in part attributable to her having learned certain phrases').[25]

[17] Ibid.
[18] L. Series, *Briefing Paper: The Participation of the Relevant Person in Court of Protection Proceedings.* (September 2014). In a later judgment from 2016, the ECtHR clearly placed a premium on the opportunity to be heard in person, compared to representation by others in fulfilment of these rights: See *A N v Lithuania* (2016) ECHR at [90]: '…it is essential that the person concerned should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation.'
[19] Ronner (n.10).
[20] A. Freiberg, 'Therapeutic Jurisprudence in Australia: paradigm shift or pragmatic incrementalism' (2002) 20(2) *Law in Context* 6, 16.
[21] F. Raitt, 'Hearing children in family law proceedings: can judges make a difference?' (2007) 19 CFLQ 204 and Sir Nicholas Wilson, 'The Ears of the Child in Family Proceedings,' Hershman/Levy Memorial Lecture 2007 (available at https://www.judiciary.gov.uk/.../wilsonlj-hershman-levy-memorial.pdf) (accessed 2.7.18).
[22] E.g. *Y County Council v ZZ* [2012] EWCOP B34, [3].
[23] *A Local Authority v TZ* [2013] EWCOP 2322, [45].
[24] [2016] EWCOP 4, [10].
[25] Ibid [53].

Such statements verify the probative value of P's contributions and credibility as a witness, but their purpose clearly extends beyond these forensic concerns. The same rhetoric features in cases where the judge encounters P, but P is *not* giving information or evidence. For example, 'PB is likeable, highly intelligent, sophisticated and articulate, well-read and knowledgeable... and 'It is obvious to me from all that I have read and heard as well as from the meeting that PB's intellectual understanding is at a high level'.[26] Similarly, in another case of a judge simply meeting with the patient, P was described as 'engaging and polite'…..'articulate' and 'amusing'….'She listened carefully to questions and answered them equally carefully.'[27] Such validating judicial narratives ratify P's participation in the process, signalling that she is being listened to and confirming that P should feel entitled and not 'out of place' in the courtroom. Voice is not always accompanied by validation, however. In *GW v A Local Authority*, P later appealed the decision on the grounds that, despite her evidence being given in person over many hours and being extensively cross examined, the judgment barely mentioned her evidence.[28]

In Ronner's formulation, 'voluntariness' (the third 'V') is a feeling which often emerges from the experience of voice and validation in court proceedings.[29] But something seems to be missing from this account – surely Ronner did not intend to imply that superficial, ritualistic engagement with P provides sufficient fulfilment of the TJ agenda. A preferable interpretation would be to read 'voluntariness' as having independent significance, as requiring some form of 'weight' or 'influence'[30] to be attached to P's views, or as Winick advocates in another context, 'honouring [P's] choice where possible.'[31] Recognising direct engagement as having not just symbolic or expressive

[26] *Norfolk CC v PB* [2014] EWCOP 14, [44] and [45].
[27] *Re CD* [2015] EWCOP 74, [31].
[28] [2014] EWCOP 20. Her appeal was unsuccessful, although the appeal judgment recognised that the reference to this evidence was 'undoubtedly…brief,' [41].
[29] (n.10), 95.
[30] On the need for 'influence' see Laura Lundy's work on Article 12 of the CRC 'Voice is not Enough' (2007) 33(6) *British Educational Research Journal* 927, 933, although in the context of the child's 'right to be heard' rather than TJ.
[31] B.J. Winick, 'Competency to consent' (1991) 28 *Houston Law Review* 15, 46-53.

significance, but also instrumental force, speaks to the close relationship between TJ and procedural justice.[32]

Wye Valley and the Functions of a Meeting with the Judge: Embracing the 3 'Vs'?

The judgment in *Wye Valley* referred to at the outset of this paper, provides the only detailed judicial exposition of the functions of a meeting between the judge and P, and it resonates closely with TJ concerns. P had been found to lack capacity to decide whether the recommended amputation should go ahead. Justice Peter Jackson met with him in his hospital room, largely to ascertain his wishes and preferences as part of assessing his 'best interests.' The resulting judgment reflected on the value of such meetings and recognised, in effect, a triangulation of therapeutic benefits but also contained some mixed messages on 'voluntariness,' that is, whether P's voice in this context could make a difference to the decision.

First, Justice Peter Jackson observed that the meeting gave the judge a 'deeper understanding' of P's view of the world.[33] In *developing* the judge's understanding, this might imply that P's voice may have instrumental value, in that it could potentially alter the outcome. Secondly, the judge thought that these meetings could help P[34], by giving him the opportunity to get his *voice* across, but also in giving him a better understanding of the process and 'helping him to make sense of the outcome.'[35] Finally, these meetings were helpful for those caring for P - giving P the opportunity to be heard directly could reduce strain in the therapeutic relationship.[36] These aspects of the judgment echo the concerns of TJ with the emotional and psychological impact on P of decision making, but recognise extended therapeutic impact to those close to P who may also be adversely affected psychologically

[32] In particular the seminal work of T. Tyler and E. Lind, *The Social Psychology of Procedural Justice.* (Springer, 1988). On the relationship between TJ and procedural justice, see e.g. D. Wexler, 'Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence' (2007) 44 *Court Review* 78.
[33] *Wye Valley* (n1), [18].
[34] ibid.
[35] The concern with making P 'feel' that they are participating, echoes the guidance for judges meeting children where the purposes of such meetings are stated as being 'to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her. *Guidelines for Judges Meeting Children* [2010] 2 FLR 1872, [5].
[36] (n1), [18].

by the law's incursion into decision making.[37] Only the first of the three functions appears to recognise that P's voice, as expressed in his meeting with the judge, can make a difference. Nevertheless, the *Wye Valley* judgment can be read as an enthusiastic endorsement of the three 'Vs' embedded in TJ. Space was created to hear P's 'view of the world' (voice and validation), but critically, the meeting ultimately 'honoured P's choices', steering the judge away from the expert view that the amputation should proceed (voluntariness).[38] As will become clear, such meetings have been rare and uncertainty regarding whether Family Court practices should be transplanted to the CoP may have been a factor impeding their use.

2. PARALLEL UNIVERSES: THE PROXIMATE JURISDICTIONS OF THE FAMILY COURT AND THE COP

In the context of P's participation in CoP cases, Justice Rogers refers to the potential for 'helpful parallels' to be drawn with Children Act proceedings in the Family Court.[39] When CoP judges find themselves with no clear steer on how to deal with a particular issue, they not infrequently reach across to Family Court judgments for guidance.[40] This cross-pollenation is unsurprising, as there are many ways in which the Family Court deciding Children Act 1989 cases, and the CoP deciding cases under the MCA, operate in parallel universes. Both statutes govern jurisdictions requiring the court to make decisions advancing the child's welfare/P's best interests,[41] and in both cases the subject's 'ascertainable wishes and feelings' are a relevant (although not determinate) factor in determining those best interests.[42] Added to these broad parities, judges in the CoP frequently have substantial experience of sitting on cases involving children, (including Sir James Munby who has served as President of both the CoP and the Family Division simultaneously) and the lawyers appearing in court

[37] The therapeutic value of the CoP's work to families of P has been recognised in withdrawal of life sustaining treatment cases: S. Halliday et al, 'An Assessment of the Court's Role in Withdrawing Clinically Assisted Nutrition and Hydration from Patients in a Permanent Vegetative State.' (2015) 23(4) Med L Rev 556.
[38] (n1), evidence of Dr Glover at [38].
[39] *A Local Authority v AB* (n3), [49].
[40] E.g. *LBX v TT* [2014] EWCOP 24, [39] and *Re AG* [2015] EWCOP 78, [26] adapting guidelines from *Re W* [2008] EWHC 1188 on when to hold finding of fact hearings.
[41] S.1(3) CA 1989 and s.1(5) and s.4 of the MCA 2005.
[42] S.1(3)(a) CA 1989 and s.4(6) MCA.

may also have substantial family law experience.[43] In these proximate jurisdictions which share personnel on both sides of the bench, some transplanting of rules is inevitable, but whilst transplanting may be 'socially easy,'[44] it can create the risk that problematic approaches are mirrored, and thereby mutually reinforced.

a) Direct engagement in the Family Court

Much of the momentum for encouraging judges to meet the child in Family Court cases has been generated under the auspices of the child's 'right to be heard' in Article 12 of the *UN Convention on the Rights of the Child* ('CRC'). Article 12 states that the child 'shall be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child.'[45] Although it does not mandate hearing from the child *directly*[46], UN General Comment No. 12 recommends that, where possible, children should have the 'opportunity' to be heard *directly* in proceedings.[47] Sir James Munby, speaking extra judicially, regarded Article 12 as 'driving thinking' in this area and advocated children being made to feel like 'participants' rather than 'spectators'.[48]

Notwithstanding Article 12, Family Court jurisprudence has, thus far, avoided recognising presumptions in favour of direct engagement with the child. Until recently, the prevalent judicial stance with respect to children was that the trauma inflicted by participating in the court process would likely be damaging, and this justified a presumption that it was 'undesirable' for children to give evidence.[49] In the pivotal Supreme Court case of *Re W*, Baroness Hale asserted that this position could no longer be justified; the issue of whether a child should give evidence to the court should be subject to a balancing exercise, weighing what was to be gained as against the risk of harm to the

[43] E.g. see *A Local Authority v AB* (n3), [6].
[44] See P. Legrand's work on legal transplanting in comparative law: 'The impossibility of legal transplants' (1997) 4 MJ 111 and his reference at 112 to A. Watson, *Legal Transplants* 2nd ed. (University of Georgia Press, 1993).
[45] See also Article 11(2) of Brussels II Regulation 'when applying Articles 12 and 13 of the 1980 Hague Convention it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.'
[46] The child must be heard 'either directly, or through a representative or appropriate body' (Article 12).
[47] (2009 at [35] – emphasis added). And see Thorpe LJ in *Re G* [2010] EWCA Civ 1232, [15] preferring the judge to hear directly from the child 'in carefully arranged conditions'. A meeting with the judge provides one means of offering this opportunity, but it may also be fulfilled by the child giving evidence in the case.
[48] Sir James Munby, *Unheard voices.* (annual lecture of The Wales Observatory on Human Rights of Children and Young People, 2015) (accessible at https://www.swansea.ac.uk/media/Sir James Munby Annual lecture 2015, accessed 2.7.18).
[49] [2010] UKSC 12, [22]. See also *Re W (secure accommodation)* [1994] 2 FLR 1092 *per* Ewbank J, '…the court should always bear in mind that attendance in court is **likely to be harmful to the child**.' (emphasis added).

child.[50] This shift did not, however, equate to a presumption *in favour* of giving evidence, even if the child had expressed the wish to do so[51] – such wishes were merely to be taken into account in the balancing exercise.[52] The current *Guidance for Judges Meeting Children* mirrors *Re W*'s non-presumptive model. It leaves the matter of whether the meeting happens in the hands of the judge and there is no explicit presumption that it should happen in every case where it is desired.[53]

Another distinctive factor of Family Court practice is that it draws an uncompromising distinction between different forms of direct engagement. Where additional information emerges from a 'meeting' between the judge and a child (as opposed to the giving of 'evidence'), the information cannot be given any weight. This is because a 'meeting' without the lawyers being present is regarded as putting fundamental adversarial norms at risk, namely that the case should be decided on the 'evidence,' which must be presented in open court, and that the parties should be given the opportunity to test that evidence by way of cross-examination.[54] The Family Court maintains a robust distinction between 'forensic' and 'non-forensic' purposes, with private meetings between the judge and the child being confined to the latter. The forensic/non-forensic distinction is a persistent theme in guidance and jurisprudence concerning family proceedings. The *Guidance for Judges Meeting Children*,[55] for example, includes the emphatic[56] reminder that:

> '…the child's meeting with the judge **is not for the purpose of gathering evidence …**The purpose is to enable the child to gain some understanding of what is going on and to be reassured that the Judge has understood him/her.'[57]

This distinction was reaffirmed as a 'firm line' by the Court of Appeal,[58] and judges have been

[50] *Re W* (n49) [26]-[28] *per* Baroness Hale.
[51] Followed in *Re R (Children)* which found in favour of the child who wished to give evidence being permitted to do so, but on the basis of a balancing exercise with no presumptive starting point. [2015] EWCA Civ 167. Cf *P-S (Children)* [2013] EWCA Civ 223, [37].
[52] *Re W* (n49), [26].
[53] [2010] 2 FLR 1872. A wish to meet the judge should be communicated to the judge, but representations may be made as to whether this is appropriate. It should be noted that there is still resistance to judges meeting children without relevant training (see Hunter (n15) and P. Tapp, 'Judges are humans too: conversation between the judge and a child as a means of giving effect to section 6 of the Care of Children Act 2004' [1996] *New Zealand Law Review* 35), but exploring this issue is outside the scope of this article.
[54] E.g. *MB v Surrey CC* [2017] EWCOP B27, [8]: '…the Court is the servant of the evidence that is provided by the parties.'
[55](n53). These were supplemented by *Guidelines in Relation to Children Giving Evidence in Family Proceedings* in 2012.
[56] In the terms 'it cannot be stressed too often that…'
[57] At [5], emphasis added.

warned to take great care to avoid 'contamination' of the proceedings in this context.[59] In the leading case of *Re KP* Mrs Justice Parker's decision was successfully appealed on the grounds that she had treated her meeting with the child in the case as 'part of the evidence'.[60] The judge had departed from the guidelines as evidenced by the fact that she referred to what the child had said as akin to 'representations' or 'submissions', and the transcript of the meeting showed that she had asked no less than 87 questions during the meeting.[61] It was not these departures which were crucial in overturning the judge's decision, but rather the finding that the judge had allowed this meeting to become 'pivotal'[62] to her decision and had been the reason for rejecting the CAFCASS officer's evidence on the child's objections to a return to Malta with her father.

This distinction between 'non-forensic' communication and 'evidence gathering' has generated a number of appellate decisions (see below), and it is entirely plausible that this would deter judges from meeting the child lest they stray into this forbidden territory. These meetings may therefore afford voice and validation, but any sense of voluntariness is absent if there is no right or presumption in favour of meeting the judge if the child wishes it, and if things told to the decision maker cannot bear any weight.

b) Direct engagement and the 'two stages' of CoP proceedings

In the CoP, the *UN Convention on the Rights of Persons with Disabilities* ('CRPD') has played a similar role to the CRC in galvanising efforts to rethink how P's voice might be heard. Specifically, Article 13 provides that people with disabilities should have 'effective access to justice…on an equal basis with others' and requires states to provide 'procedural and age appropriate accommodation to facilitate their effective role as *direct* and indirect participants.' The UN Committee on the CRPD has not released a General Comment on Article 13, but it is likely that modes of *direct* participation would

[58] *Re KP* [2014] EWCA Civ 554, [50].
[59] Ibid [57].
[60] Ibid.
[61] And see Baroness Hale's remark that Justice Parker was a 'formidable cross-examiner…It cannot have been a pleasant experience for the child': *Are we nearly there yet?* (Association of Lawyers for Children Conference, 2015) (p.13).
[62] (n58), [59].

be preferred in the context of persons with disabilities too.[63] As Perlin has argued, embracing the values of TJ, with its emphasis on voice and participation can be viewed as an important preliminary step towards meaningful enforcement of the CRPD.[64]

There are commonly two stages to health and welfare proceedings[65] in the CoP, either of which might feature direct engagement. The first of these is the 'jurisdictional stage,' where the court determines whether P lacks decision making capacity on a particular issue or set of issues. Only if a determination of incapacity is made, does the court have jurisdiction to make a decision on behalf of that person, applying the 'best interests' criteria set out in s.4 of the MCA.[66]

The gateway concept of mental 'capacity' and direct engagement

It goes without saying that a determination that someone lacks capacity can deprive them of rights (such as the right to refuse treatment, or to choose where to live), whilst also being loaded with substantial anti-therapeutic effects, potentially leaving them feeling stigmatised, powerless and deprived of their personhood and dignity.[67] This is starkly captured in *GW v A Local Authority & Anor*, where the decision on P's capacity would determine whether she could leave her accommodation and walk into town unescorted, and was described as: *"... a litmus test on who she is and on the progress of her condition, the answer to which goes right to the core of her identity and lifestyle."*[68] Direct engagement with the court in the form of P giving evidence has, in rare cases, been so transformative to the case that it has resulted in the judge making a decision which departed from the preponderance of expert evidence on capacity, or even resulted in unanimous expert evidence on P's capacity being rejected altogether. In an earlier study the author surveyed 66 CoP judgments which examined capacity in detail and found just three of these in which the judge went against a consensus of expert evidence on capacity. It is no coincidence that in each of these cases, P had given

[63] Although the Convention is not legally binding, the UK is a signatory which signals a commitment to developing our frameworks so as to better protect these important Convention rights: *Birmingham City Council v Burnip* [2012] EWCA Civ 629, [19-22].
[64] M. Perlin, 'Striking for the Guardians and Protectors of the Mind' (2013) *Penn St L Rev* 1159 at 1189.
[65] This analysis focuses on 'health and welfare' cases, rather than property and financial affairs cases, largely because the latter are dealt with very differently (direct engagement is even more rare) and are not easily compared with the health/welfare cases.
[66] *Per* Charles J in *V v Associated Newspapers* [2016] EWCOP 21, [55].
[67] ibid.
[68] [2014] EWCOP 20.

oral evidence in court on her own capacity.[69] These are stark examples of direct engagement providing voice, validation and, ultimately, voluntariness (changing the outcome of the case), whilst also providing a valuable check on expert opinion.

Participatory 'best interests' decision making

Where the CoP finds that P lacks capacity on the matter at hand, decisions as to P's future, must be decided in accordance with P's 'best interests'[70] and P's own wishes, feelings, beliefs and values are stipulated as relevant factors in identifying those best interests.[71] When reflecting on his private[72] meeting with Mr B, Justice Peter Jackson appeared to explain the meeting as an application of the participatory provisions of s.4(4) of the MCA[73] which requires that 'so far as reasonably practicable, P must be *permitted and encouraged to participate* in any decision affecting him,' which of course includes decisions as to what is in P's best interests. Prior to the MCA it was common for P's wishes and feelings not to feature explicitly in the best interests assessment at all,[74] a sign perhaps that P was not routinely afforded any kind of voice. The CRPD edict that P's will and preferences should be 'respected,'[75] has resulted in closer attention to the issue, although so far falling short of 'honouring [P's] wishes where possible'.[76]

Alongside these developments, Lady Hale's obiter in *Aintree University Hospitals NHS Foundation Trust v James* that the 'whole point' of the best interests test was to consider matters from P's 'point of view'[77] has augmented the elevated status of wishes and feelings in the best interests equation. Lady Hale's encouragement to look at matters from P's vantage point has visibly cascaded down to

[69] See *CC v KK* [2012] EWCOP 2136*, Re SB* [2013] EWCOP 1417 and *Re Z* [2016] EWCOP 4 discussed in P. Case, 'Negotiating Domains of Mental Capacity: Clinical Judgment or Judicial Diagnosis?' (2016) 16 MLI 174.
[70] S.1(5) MCA 2005.
[71] S.4(6) MCA 2005.
[72] The judge in the presence of the judge's clerk and a nurse.
[73] (n1), [19].
[74] E.g. *Re A* [2000] 1 FCR 193 and see M. Donnelly, 'Best Interests, Patient Participation and the Mental Capacity Act 2005' (2009) 17 Med L Rev 1.
[75] Article 12(4).
[76] Winick (n31). See now *Mental Capacity (Amendment) Bill 2018,* cl.8, amending s.4 to require 'particular weight' to P's wishes and feelings where they have been ascertained (despite much support for a presumption in favour of P's wishes and feelings determining the outcome – see A Ruck Keene, 'More Presumptions Please' (2015) Elder L J); E. Jackson, 'From Doctor Knows Best to Dignity.'(2018) 81(2) MLR 247 which engages in some detail with *Wye Valley*.
[77] [2013] UKSC 67, [45].

CoP judgments[78] and has more recently evolved into the language of 'standing in P's shoes'[79], another metaphor for empathetic judging.[80] These adjustments in emphasis can be taken to imply a recalibration of best interests decision making, countering the formulaic language of 'checklists' and 'balance sheets' and endorsing a more wholistic approach. Echoing Lady Hale's statement, Peter Jackson J had located the importance of his meeting with Mr B in 'deepening understanding' of Mr B's 'point of view'[81] and it would certainly seem counterintuitive to exclude the direct voice of P, or access it only indirectly, when trying to ascertain what that point of view is. A meeting with the judge, whether in private or giving information or evidence in open court, can therefore provide a means of ascertaining wishes and feelings, although it would rarely constitute the sole mechanism for this.[82] Encouraging and facilitating meetings between the judge and P are therefore key to attaining the empathetic, 'P-centric' approach prescribed in *Aintree*, to realising the context of P's wishes and feelings, and, accordingly, informing judgments about the appropriate weight to place on them in the individual case. But how frequently does P meet with the judge?

3. (IN)VISIBILITY OF DIRECT ENGAGEMENT IN HEALTH & WELFARE DECISIONS FOR ADULTS

Before exploring the prevalence of and impediments to direct engagement in the CoP (with a particular focus on meetings with the judge), some preliminary observations should be made. Beyond reported judgments, little accessible data exists on the prevalence of direct engagement. Giving evidence to the House of Lords Select Committee on the MCA in November 2013, one CoP judge

[78] E.g. in *Wye Valley* itself: incapacity is not an 'off switch' for P's rights and freedoms, (n1), [11]. See also Biggs identifying a shift towards a compassionate person centred approach: 'From dispassionate law to compassionate outcomes in health care law or not.' (2017) 13(2) *Int J of Law in Context.* 172, 179. Whilst there is an emerging body of literature on the weight attached to P's wishes and feelings in decisions as to what is in P's 'best interests' that issue is outside the scope of this paper: see, however, A. Ruck Keene, above (n59) and M. Donnelly, 'Best Interests in the Mental Capacity Act: Time to say Goodbye?' (2016) 24(3) Med L Rev 318.

[79] *Re P* [2017] EWCOP B26; *DM v Y City Council* [2017] EWCOP 13; *Cambridge v BF* [2016] EWCOP 26, [22] 'doing the best I can to put myself in her shoes'.

[80] See S. Bandes, 'Compassion and the Rule of Law.' (2017) 13(2) *Int J of Law in Context* 184 at 185, defining empathy as not taking sides, but 'a desire to see things from the vantage point of another – to try to understand what is at stake for the parties.

[81] See above.

[82] Professionals are usually tasked with informing the court of the wishes and feelings of the subject of proceedings (usually a CAFCASS Officer in the case of children, and a treating or independently appointed doctor, psychologist, IMCA (independent mental capacity advocate) or social worker in the case of P). Cf New Zealand where it is envisaged that the judge meeting the child will be the primary means of ascertaining wishes and feelings: J. Caldwell, (n13) at 57 and P. Tapp (n53).

thought that she had communicated *directly* with P in about ten per cent of cases.[83] As most CoP cases are dealt with on the papers, rather than involving an oral hearing, this may suggest that an even smaller proportion of the whole CoP caseload involves any direct engagement with P.[84]

Judgments can provide further insights into practices of direct engagement, but although the CoP was created by the MCA in 2005, published judgments were slow to materialise. By 2016 a more liberal policy on publication was in place[85] and the British and Irish Legal Information Institute repository of judgments (bailii)[86] was utilised by the author to compile a database of over 300 CoP judgments for the purposes of assessing post-MCA jurisprudence on a number of issues. There are, of course, methodological limitations to research which uses judgments as a lens through which to assess the dynamics of court proceedings. For example, a number of judgments concern emergency applications where the judge must produce a reasoned decision under extreme time constraints,[87] and P's engagement with the court may not therefore be reflected in the detail which in fact occurred.

The author initially reviewed 326 CoP judgments from some of the earliest reported CoP judgments in 2008 up to July 2017. Only 202 of these concerned the CoP's health and welfare jurisdiction and there were at least 13 where it was clear that meeting P would not really have been relevant.[88] A survey of the 189 remaining judgments reveals examples where the feasibility of P meeting the judge would have been obviously impeded by practical considerations. First, meaningful engagement in person may simply not be possible due to P having a disorder of consciousness. At least 17 cases in the database where identified where P was in a minimally conscious state, permanent vegetative state or was otherwise suffering from reduced consciousness.[89] There were at least six cases involving emergency applications, usually involving a request to perform an emergency caesarean section, leaving insufficient time to arrange a meeting with P. Furthermore, in some instances, delay in getting

[83] http://www.parliamentlive.tv/Event/Index/0fe8cea8-89db-453c-afb2-7a97d8b20db1 accessed 04/03/18.
[84] L. Series, P. Fennell and J. Doughty (n7) p.98.
[85] *Practice Guidance (Transparency in the Court Of Protection)* [2014] EWCOP B2, particularly para 16.
[86] British and Irish Legal Information Institute - http://www.bailii.org.
[87] For examples, see *Re AA* [2013] EWCOP 4378; *Re SB* [2013] EWCOP 1417.
[88] E.g. where the judgment was concerned with reporting restrictions rather than the substantive health and welfare issues.
[89] E.g. *PS v LP* [2013] EWCOP 1106 – P had suffered a cerebral aneurism resulting in participation not being possible – 'it is uncertain whether she knows who or where she is', [5].

the case to court precludes direct engagement, because by then P's health may have deteriorated to a point that they are not able to communicate.[90] P's mental impairment may be an impediment to such a meeting, for example cases of 'severe learning disability' or advanced dementia may mean that there is no purpose in a meeting with a judge and these features were possibly evident in up to 21 further cases. In one case the court sanctioned keeping the proceedings a secret from P (for example, for patients with persecutory delusions), which of course rules out meaningful participation[91] and in another, it was expressly decided to be against P's best interests to meet the judge because P was experiencing anxiety connected with the number of professionals coming to see her.[92] Of the remaining 143 judgments, there were just twenty three where P had clearly been in direct communication with the judge (sixteen per cent). Of these examples, nine appear to involve P giving formal evidence in court[93], three showed P 'giving information' in court[94] and eleven documented a meeting with the judge[95].

4. CLOSE TEXTUAL ANALYSIS OF COP JUDGMENTS EVIDENCING MEETINGS WITH THE JUDGE

This section uses the dataset of CoP judgments and 'helpful parallels' from Children Act proceedings to identify some of the potential practical and legal barriers to meetings with the judge and builds a case for further scrutiny of the legal impediments to meeting the decision maker.

a) Practical impediments to direct engagement

[90] *Re E (medical treatment: anorexia)* [2012] EWCOP 1639 – P was in a 'drug haze' at the time of the hearing due to strong sedative medication.
[91] *NHS Trust & Ors v FG* [2014] EWCOP 30. Secrecy was upheld where P suffered from persecutory hallucinations, including believing that her doctors had murderous intentions.
[92] *A Local Health Board v AB* [2015] EWCOP 31.
[93] *Y County Council v ZZ* [2012] EWCOP B34; *CC v KK* [2012] EWCOP 2136; *A NHS Trust v Dr. A* [2013] EWCOP 2442; *Re SB (A Patient; Capacity To Consent To Termination)* [2013] EWCOP 1417; *A Local Authority v TZ* [2013] EWCOP 2322; *X v A Local Authority & Anor* [2014] EWCOP 29; *GW v A Local Authority & Anor* [2014] EWCOP 20; *The Health Service Executive of Ireland v PA & Others* [2015] EWCOP 38 (video link).
[94] *Re PB* [2014] EWCOP 14; *London Borough of Redbridge v G* [2014] EWCOP 485; *Re Z & Ors* [2016] EWCOP 4; *Lincolnshire CC v JK* [2016] EWCOP 59.
[95] *Sandwell MBC v RG* [2013] EWCOP 2373; *Re M (Best Interests: Deprivation of Liberty)* [2013] EWCOP 3456; *Westminster City Council v Sykes* [2014] EWCOP B9; *A Local Authority v B* [2014] EWCOP B21; *London Borough of Islington v QR* [2014] EWCOP 2; *A Local Authority v M & Ors* [2014] EWCOP 33*; Wye Valley NHS Trust v B (Rev 1)* [2015] EWCOP 60; *Re CD* [2015] EWCOP 74; *Re W (Anorexia)* [2016] EWCOP 13 (via video link); *Newcastle Upon Tyne CC v TP* [2016] EWCOP 61; *Re QQ* [2016]EWCOP 22.

Returning to the question of why, in a substantial majority (more than 80 per cent) of the cases surveyed, P had not appeared in person or otherwise communicated directly with the judge, this data needs to be further contextualised. The above analysis suggests there were 120 cases in the dataset where it is not possible to say from the judgment exactly why there appears to have been no encounter between P and the judge. It may have been because P preferred not to meet the judge because of the psychological demands of talking to a judge, appearing in court and/or giving evidence. Few vulnerable people would willingly expose themselves to the scrutiny of the court without some trepidation.[96] P's condition and/or their situation may mean that they experience problems in articulating their thought processes clearly, and this may magnify the 'fear factor' of attending or participating in court. It is notable, for example, that in *Re DD*, P chose not to co-operate with the process at all,[97] and in *A NHS foundation Trust v Ms X*, P had expressed the wish not to be in contact with the judge, even via telephone, or to otherwise be part of the process.[98] Even if health permits, the physical demands of travelling to/appearing in court may be problematic and may be contingent upon resources and professionals/carers being able to commit the time to accompany P in what can be lengthy proceedings.[99] The judgments also indicate that in a small number of cases, a lack of planning is responsible for P not being heard in the CoP.[100]

Many of these difficulties may mean that a meeting with the judge as happened in, as happened in *Wye Valley*, is the most attractive and practical option for enabling P to tell her story directly to the decision maker (although even then, this may not be possible). Practical impediments aside, the law has generated other uncertainties which may cumulatively explain why meetings between the judge and P have up to now been relatively rare.

b) Legal impediments to meetings with the judge: the risk of 'contaminating' the evidence

[96] If they do, they may be subjected to 'hours of cross examination': *GW v A Local Authority & Anor* [2014] EWCOP 20.
[97] *The Mental Health Trust & Anor v DD & Anor* [2014] EWCOP 11.
[98] [2014] EWCOP 35.
[99] *Re SB* [2013] EWCOP 1417 – P's ability to give direct evidence was attributed in part to the efforts of her medical team.
[100] There are numerous examples of judges chastising NHS Trusts for not bringing matters to the Court's attention more promptly: *A Local Authority v K* [2013] EWHC 242 (COP); *NHS Trust & Ors v FG* [2014] EWCOP 30; *AB v Sandwell* [2014] EWCOP 23, [39].

Practitioners and academics have queried whether the forensic/non-forensic distinction applied in the Family Court has the same traction in the CoP.[101] In guidance and jurisprudence connected with the CoP the forensic/non-forensic distinction is seldom referenced, and in the few instances where it appears, it is in the context of precluding a meeting with P. For example, in *Norfolk CC v PB*[102] Parker J recorded her reluctance to accede to a request to meet P at the hearing, stressing that 'care has to be taken as to how a meeting shall be treated.'[103] If the meeting was to take place in the presence of the judge alone and without the opportunity to test 'the evidence', no conclusions of fact could be drawn from it. The judge had clearly assumed that the practices of the Family Court applied in equal measure to the CoP on this issue. *YLA v PM*, also decided by Mrs Justice Parker, records that a request on P's behalf to meet the judge was denied.[104] The application concerned whether a 37 year old vulnerable adult could choose to remain with her husband and baby, or needed to live in residential care away from her family. Placing a clear premium on direct engagement, the Official Solicitor requested that the judge meet with P 'because 'reading [PM's] stated wishes and feelings is perhaps a poor substitute for the court's ability to acquire more direct, first-hand experience of [PM] and her situation.'[105]

The initial application was, however, rejected on the grounds that the judge felt she was being invited to make an assessment of the *strength of* P's wishes and feelings 'and indeed capacity.'[106] Justice Parker clearly regarded a meeting touching on either of these issues as potentially breaching the 'gathering evidence' rule. The approach of this particular judge further supports suggestions that some judges will find it impossible to avoid forming impressions which could influence their view of the evidence.[107] Having said that, arguably *YLA* raised particular concerns because the judge regarded capacity as uncertain at that point in proceedings. An alternative means of dealing with this would have been to meet with P and, if the judge regarded the meeting as having any bearing on P's

[101] E.g. V. Butler Cole and L. Hobey-Hamsher, 'The assessment of capacity by judges in the Court of Protection.' (2016) 2 Elder L J 1 and *Facilitating the Participation of P and Vulnerable Persons in Court of Protection Proceedings* 2016.
[102] [2014] EWCOP 14.
[103] Ibid [42].
[104] *YLA v PM* [2013] EWCOP 4020.
[105] Ibid [32].
[106] Ibid [34].
[107] See below.

capacity, she could have ordered further reports or requested P to give evidence or information on her capacity in open court.

Is the forensic/non-forensic distinction observed in the CoP?

The *Norfolk* and *YLA* judgments are fairly exceptional in their explicit assumption that the gathering evidence rule applies equally to meetings with the judge in the CoP, and this is probably explained by the fact that they were decided by the same judge whose decision had been appealed in *Re KP*. Aside from these judgments, evidence on the applicability of the rule in the CoP context is inconclusive. On the one hand, it might be argued that the distinction is to be implied, as CoP guidance refers to the importance of agreeing the 'purposes' of such a meeting in each individual case,[108] and the guidance also devotes separate sections to 'meeting with the judge,' 'P giving information to the Court' and 'P giving evidence.'[109] Similarly, in the recent case of *AB* the non-forensic/evidence gathering distinction is not referred to, but 'participation' is again stratified, with 'a relatively low-level meeting with the judge' being treated as distinct from 'giving information or evidence.'[110]

On the other hand, none of these sources directly clarifies whether the forensic/non-forensic distinction has any application to P's meetings with the judge in the CoP. Compounding this uncertainty, the CoP guidance is expressly 'not prescriptive'[111], there are no higher court decisions on the matter and the jurisprudence of the CoP is, strictly speaking, of little precedential value.[112] Rogers J in *A County Council v AB* remained elusive on the issue of whether jurisprudence from the Family Court could be applied in CoP cases. Referring to a 2016 Court of Appeal decision in *Re E*, he refused to apply it as a 'precedent', 'template' or 'presumption of the judicial approach' to be adopted in the CoP, but confined its import to being 'of interest' and a 'useful indication' of the modern approach to

[108] *Facilitating the Participation of P and Vulnerable Persons in Court of Protection Proceedings* 2016, [14].
[109] Ibid at [14-20].
[110] [2016] EWCOP 41, [48].
[111] [2016] EWCA Civ 473 – child giving evidence directly to the court in care proceedings.
[112] See Biggs (n.78) highlighting the tendency of CoP judges to stress the highly individualistic nature of the decisions being made, tempering the norms of precedent.

'participation' in its broadest sense.[113] This equivocal stance again leaves the applicability of *Re KP* to the CoP uncertain.

If, for the moment, we assume that the forensic/non-forensic distinction has traction in the CoP, can we say that CoP practice has been to observe the distinction? Series et al reported in 2016 that judges in the CoP *had* effectively gathered evidence from meetings with P when the other parties did not seem to be present.[114] No cases were cited in support of this observation, but the report continued by stating that this approach would not be palatable for those who 'transpose the logic of judicial meetings with children onto the CoP's practices and procedures for meeting P'.[115] An analysis of CoP judgments certainly reveals some judicial narratives which apparently conflict with the gathering evidence rule, or which at least do not subscribe to the idea of an impermeable firewall between meetings with P and the rest of the case. For example, as stated in the opening section of this paper, Justice Peter Jackson in the *Wye Valley* case had said; 'I did not feel able to reach a conclusion without meeting Mr B myself.'[116] This wording envisages the meeting as being potentially decisive, as having a bearing on the outcome and therefore clearly as having forensic value. In the later case of *Re CD* the judge, commenting on *Wye Valley,* said 'Mr Justice Jackson met Mr B and it is obvious from his judgment that the encounter was *critically valuable*.'[117] This reflection on the *Wye Valley* judgment again suggests a perception at least that the meeting had an impact on the outcome – how else could it be 'critically valuable'? These judgments might be taken to suggest that the judge is taking a more pragmatic view of these meetings and does not regard the 'firm line' in Family Court cases as necessarily being transferable to CoP judgments. Uncertainty regarding the traction of the gathering evidence rule in the CoP and conflicting narratives regarding whether meeting P can and should be kept separate from the grounds of the decision can only add to any judicial reticence to meet P.

5. DISCUSSION: SHOULD THE COP MIRROR THE FAMILY COURT EXPERIENCE?

[113] [2016] EWCOP 41, [56].
[114] L. Series et al (n7), 101.
[115] *Ibid.*
[116] [2015] EWCOP 60, [18].
[117] [2015] EWCOP 74, [31].

The issue of how far the CoP *should* mirror Family Court practice on judges meeting children is unresolved. It seems, however, from the above that uncertainty regarding the constraints of the adversarial process operates as a potential barrier to meetings with the judge. It is argued below that the CoP should take a deliberate step away from the Family Court approach, as that approach is based on a fiction, creates tensions with the two stages of CoP proceedings, and is at odds with a jurisdiction which is increasingly recognised as inquisitorial:

a) The premise of the 'gathering evidence' rule is built on a fiction

The premise of the gathering evidence rule, with its distinction between forensic and non-forensic settings, is built on a myth; namely the assumption that an impermeable barrier can be maintained between a meeting with P and the 'evidence' on which the case is decided. It is doubtful that judges can 'compartmentalise' information so that those things which the judge comes to know through the accepted channels of 'evidence' can be brought to bear on the decision, but those other things learned about P (e.g. in an informal meeting) can be prevented from influencing the decision. There is an impressive body of psychological research which challenges the notion that jurors can, on instruction, disregard 'inadmissible' evidence that they have just heard.[118] Some research with mock jurors even suggests that paradoxically, 'refraining from thinking unwanted thoughts is so difficult that it can produce an ironic process' whereby 'more attention is given to the thing they are supposed to ignore.'[119] But, it might be argued that whilst a lay person may struggle with the mental challenge of 'cordoning off' information when making a decision, this ability is within the competence of an experienced judge. Empirical research by Wistrich et al suggested, however, that judges too found it difficult to ignore what they knew.[120] Speaking extra-judicially, Baroness Hale appeared to recognise that a strict divide between forensic and non-forensic functions in meetings with the child was 'unrealistic':

[118] See e.g. J, Lieberman & J. Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychol Pub Pol'y & L* 677; D. Wegner, 'Ironic Processes of Mental Control', (1994) 101 *Psychol Rev*, 34; and D. Wegner & R. Erber, 'The Hyperaccessibility of Suppressed Thoughts', (1992) 63 *J Personality & Soc Psychol* 903.
[119] A. Wistrich et al, 'Can judges ignore inadmissible information?' The difficulty of deliberately disregarding.' (2005) *Uni of Pennsylvania Law Review* 1251 at 1262.
[120] Ibid.

> 'I sometimes learned something I did not already know. And I felt better able to predict how things would go in the future, for better or for worse. It may not have changed the decision I was going to make, but it certainly made it easier to make it.'[121]

These meetings are not meant to elicit new evidence, but it is hard to see how learning something you 'do not already know' does not alter the evidence base for the decision.

The fiction that judges can somehow hermetically 'seal off' the information they have obtained through the channels of 'evidence,' from extraneous information is compounded by a secondary fiction employed in appeal judgments from Family Court decisions. Where a decision has been appealed on the grounds that the judge 'gathered evidence' from their meeting with the child, the appeal court in effect tolerates the meetings generating new information as long as the judge has provided a convincing account that it has not changed their decision. Much appears to depend upon the judge's *own* account of whether the meeting has influenced the outcome and mostly, these appeals fail.[122] In *Re A,* for example, irregularities in the meeting were excused on the ground that the judge had emphasised that his meeting with the children in the case 'had not been determinative and that he had simply taken it into account as something which accorded with his preliminary view that the children were telling the truth.'[123] But how can a judge be sure about what has or has not influenced them? Parkinson and Cashmore's research with Australian judges reported some skepticism about being able to avoid meetings with the child becoming (imperceptibly) forensic:

> 'How do you divide in your own mind what's influencing you?...I can't help but be gleaning things. I won't even know how I'm using those, it might even be the language the child uses…the demeanour…'[124]

[121] Baroness Hale, *Can You Hear Me Your Honour?* Hershman/Levy Memorial Lecture, 2011 (available at www.alc.org.uk/...you_hear_me,_Your_Honour._Memorial_**lecture**_2011.pdf) (emphasis added).
[122] See e.g. *Re N-A* [2017] EWCA Civ 230.
[123] *Re A (Fact Finding Hearing: Judge meeting with Child)*[2012] EWCA Civ 185: 'I saw Jo not for the purposes of gathering evidence, nor do I attribute to myself any skill with children that is of forensic value… I deal with it at this part of the judgment to make clear the fact that I had not come to my final decisions *but had formed a view before I saw Jo*. (*per* His Honour Justice Richardson) At [95-97] of his judgment, replicated here at [33] (emphasis added).
[124] P. Parkinson and J. Cashmore, (n13), 184.

Just as it is unlikely to be feasible for decision makers to insulate their decision from the meeting with P/the child, it is implausible that decision makers can be certain that the meeting has not influenced the outcome. These observations are echoes of Jerome Frank's famous assertion that 'justice is what the judge ate for breakfast'.[125] We know that extraneous factors can and do affect judicial decision making, often subliminally,[126] but the final judgment must maintain the façade that the decision is entirely a product of what the law accepts as 'evidence', which is narrowly defined. If we accept that the gathering evidence rule is based on a fiction, we should consider moderating its use if it impedes P's direct engagement in their own case.

b) The 'gathering evidence' rule and the two stages of CoP proceedings

The spectre of the gathering evidence rule creates acute difficulties when we seek to apply the rule to the 'two stages' of CoP proceedings outlined above (the 'capacity' stage and the 'best interests' stage). A meeting may result in the judge coming away with a distinct impression of P which was not part of the evidence submitted in open court. For example, speaking of his meeting with P, the judge in *Re CD* said: '…the person I met was different in many respects to the person described in the papers.'[127] The court had been asked whether surgery to remove large ovarian growths was lawful in a case where P suffered from paranoid schizophrenia and referred to the growths at various times as a 'baby' and a 'spiritual lump.'[128] On meeting P in hospital, Mostyn J observed her to be a 'world away' and 'very unlike' the 'violent sociopath' she was presented as in the papers.[129] This echoes the sentiment of Peter Jackson J in *Wye Valley* where he also contrasts the person he met with the picture of him as presented in the files.[130] According to Family Court jurisprudence, forming altered impressions of P does not breach the 'gathering evidence' rule.[131] However, a real difficulty for CoP cases, is that a meeting with P can affect not just the judge's 'impressions' of P, but also the closely related issue of P's mental capacity.

[125] J. Frank, *Law and the Modern Mind.* (Stevens, 1949) reprint of original version (Coward-McCann, 1930), 40.
[126] E.g. S. Danziger et al, 'Extraneous Factors in Judicial Decisions.' (2011) PNAS 6889.and A.Kosinski, 'What I ate for breakfast and other mysteries of judicial decision making.' (1993) 26 *Loyola LA Law Review* 993.
[127] [2015] EWCOP 74, [31].
[128] Ibid.
[129] Ibid., [31].
[130] (n.1).
[131] Which does not breach the 'gathering evidence' rule in family cases according to *Re N-A* [2017] EWCA Civ 230, [30].

Capacity is a matter on which expert evidence will be submitted and which is, of course, a fundamental issue of fact in CoP cases, for a lack of capacity is a prerequisite of the CoP's jurisdiction.[132] In *Norfolk CC v PB* Justice Parker had expressed particular concerns around drawing conclusions with respect to P's capacity from the meeting.[133] A line seems to be drawn between allowing the meeting with P to influence decisions regarding P's capacity and decisions regarding best interests/P's wishes and feelings, the former being a judicial taboo. It is perhaps no coincidence then that the judges in *Re CD* and *Wye Valley* appear to have met with P once a conclusion had been reached regarding P's capacity, that part of the proceedings having been 'boxed off'.[134] This is likely a result of assumptions that the meeting with P should only affect decisions on best interests.

As compared with issues of capacity, there seems to be a consensus that material gleaned from P regarding their wishes and feelings in so far as they are relevant to their best interests, *is* a proper use of a meeting with P. Thorpe LJ in *Re A* regarded this as 'safer ground' and confirmed the appropriateness of a judge meeting with a child where the judge wished to 'ascertain for himself the strength of the child's wishes and feelings,'[135] and perhaps 'what has contributed to the formation of those wishes and feelings.'[136] The 2013 CoP judgment in *Re M* mirrored this approach and confined the relevance of such meetings as being helpful in informing the judge of P's wishes.[137] But even in the realms of the place of P's wishes in assessing their best interests, there can be what appear to be issues of fact at stake. The judge in *Wye Valley* speaking of his meeting with P appeared to be using that information to make an assessment of the 'authenticity' of P's expressed wishes, that is, in the context of this case, whether they were a product of P's bipolar disorder:

> *'All this was said with great seriousness, and in saying it Mr B did not appear to be showing florid psychiatric symptoms or to be unduly affected by toxic infection.'*[138]

[132] Section 2b) above.
[133] At [42].
[134] [2015] EWCOP 60, [2] and *Re CD* [2015] EWCOP 74, [28] – the judge was in no doubt that CD was incapacitous.
[135] *Re A* [2012] EWCA Civ 185, [55].
[136] Ibid *per* Thorpe LJ.
[137] And helping P feel part of proceedings *(Best Interests: Deprivation of Liberty)* [2013] EWCOP 3456, [42].
[138] At [37].

All of this further underlines the 'blurry' boundary between forensic and non-forensic details – information regarding *the strength of* P's wishes and feelings or the authenticity of those wishes can surely be described as matters of fact, as could the content of those wishes and feelings, and therefore findings on these matters could theoretically change the outcome of the decision. *Wye Valley* appears to contradict itself on this point. The functions of a meeting with P spelled out above echo the 'non-instrumental' objectives of judges meeting children as set out in the guidelines. They are about providing P with the opportunity to express themselves and being helped to feel a part of proceedings, without giving those meetings any potency. However, expert evidence on Mr B's best interests was divided and it does seem that the meeting was pivotal in swaying the judge against an enforced amputation.

c) The detrimental impact of reserving meetings until after capacity has been determined

One of the safeguards recommended for meetings between children and the judge is to suggest that the meeting only takes place towards the end of proceedings, once a judgment has already been reached or drafted, but not delivered.[139] This provides a way in which the judge's decision could at least in theory be insulated from what Wistrich calls 'mental contamination,' the unconscious cognitive process by which information already stored influences how we process new stimulti: 'People might not even realise how new information affected their judgment and are thus ill equipped to contain its influence.'[140] As we have seen, the device of postponing meetings with P seems to have been employed in some CoP cases, with the meeting being deferred at least until the issue of capacity has been determined.

However, postponing meetings until proceedings are nearly at a close, or at least until capacity issues are determined, compromises putting P at the heart of proceedings. Specifically, it risks any process of direct engagement becoming a cursory, tokenistic exercise. As Justice McDonald observed in the 2016 case of *Ciccone v Richie*, the child's participation should be experienced as a 'moving picture'

[139] See Wilson LJ in *Re W* [2008] EWCA Civ 538, [57] in the CA preferring any such meeting to take place only after giving judgment and only to explain the reasons for the decision.
[140] Wistrich et al (n.119), 1265.

rather than a 'still photograph.'[141] Clearly the benefits of meeting P, and affording real voice and validation would be easier to realise without artificial restrictions on when those meetings should take place.

d) Strict adherence to adversarial norms should be questioned in an increasingly inquisitorial court

Our common law system of adjudication is undoubtedly adversarial in nature. It is built on an 'age old consensus' that facts are to be proved by evidence and the 'gold standard' for testing the reliability of that evidence is the 'crucible of cross examination.'[142] Despite the proximity of the CoP jurisdiction to the Family Court experience outlined above, there are important distinctions to be made here. Whilst there have been moves to temper the corrosive effects of adversarial combat on children and parents, the Family Court continues to employ an adversarial mode of hearings[143], albeit with adjustments to the forensic process which import a distinctly 'inquisitorial' flavour. [144] Child protection cases heard in the Family Court may often raise serious allegations, and in these cases, the rights of those accused are integral to those proceedings. These rights include the right to a fair hearing which incorporates a right to have evidence against them interrogated by cross-examination.[145] Even outside of child protection work, many Family Court cases are bound to be fairly adversarial in nature. Although they may ostensibly be about the best interests of the child, they are frequently framed as a dispute between parents as to where the child should reside and under what terms they should have contact with each parent.

By contrast, fact finding hearings in the CoP are rare and the CoP's jurisdiction is sometimes referred to as 'inquisitorial'.[146] Most of the CoP's work is non-contentious and even when it does deal with

[141] [2016] EWHC 608 (Fam), [65].
[142] Wording from Mostyn J in *Carmarthenshire CC v Y* [2017] EWFC 36 at [8-16].
[143] See P. Welbourne noting that in England and Wales family proceedings remain primarily 'adversarial': 'Adversarial courts, therapeutic justice and protecting children in the family justice system.' [2016] CFLQ 205, 205.
[144] See, for example, *Re U (A Child) (Department for Skills and Education Intervening)* [2005] Fam 134, [143-4]; *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [13], [68] – [70] confirming Children Act cases to be less adversarial than criminal proceedings and taking a more relaxed approach to evidence.
[145] E.g. *Re J (A Child)* [2014] EWCA Civ 875.
[146] The CoP's jurisdiction is sometimes referred to as 'inquisitorial' e.g., see Baker J in *Cheshire West and Chester Council v P* [2011] EWCOP 1330 at [52], *A London Borough and A Foundation Trust v VT & Ors* [2011] EWCOP 3806, [5] and *Re G* [2014] EWCOP 1361, [26].

contentious cases, the nature of the court's inquiry does not sit well with the idea of an adversarial contest between two sides. The court's purpose is to discover whether P has capacity, and if not, what would be in P's best interests and it is assumed that parties are seeking the best outcome for P – there are no 'winners and losers' in CoP proceedings as there are in personal injury litigation, for example.[147] Particularly when it comes to the court's investigation of what would be in P's best interests, the role of the judge in seeking to put themselves in P's shoes might be seen as more akin to an inquisitorial decision maker who does indeed, subject to procedural safeguards (such as making that evidence available to the parties), gather their own evidence.[148] It is accepted that in the context of unconscious patient for whom a decision must be made, the court should 'seek as many narrative threads as possible' to ascertain P's perspective[149], but that means that when P is not suffering a disorder of consciousness, the most important 'thread' for ascertaining that perspective is to hear from P directly.

Part of the CoP's inquisitorial alignments are set out in the MCA itself and show that in certain circumstances the court does indeed 'gather evidence'. Under s.49 the Court has the power to 'require' oral or written reports from the Office of the Public Guardian, CoP Visitors, or from any NHS body or local authority on any issue 'relating to P' as the court may direct, including an assessment on P's capacity.[150] An analysis of the judgments sees CoP Visitors being mentioned frequently in the context of financial and property matters, but only rarely in health and welfare cases. Nevertheless, there are a few examples of the court using this power to flex its inquisitorial muscles. For example, in *Re RS,* the CoP asserted its power under s.49 to commission a report from a Health Trust on P's capacity,[151] and in *Re NRA,* Charles J highlighted the potential of s.49 to assist the court in fulfilling its investigatory functions[152] in relation to deprivation of liberty cases where there was no litigation friend. The nature of the CoP's jurisdiction leaves it free to develop more inquisitorial

[147] With thanks to Alex Ruck Keene for this comment.
[148] One hallmark of essentially inquisitorial systems is that the judge's role includes gathering the evidence: R. Finkelstein, 'The Adversarial System and the Search for Truth.' (2011) 37(1) *Monash U L Rev* 135.
[149] G. Birchley, 'What God and the Angels know of us?' (2018) Med L Rev (online first) at 25.
[150] S.61(2) and (3) MCA: 'CoP Visitors' are appointed by the Lord Chancellor under s.61 of the Act.
[151] [2015] EWCOP 56.
[152] [2015] EWCOP 59, [261].

practices and gives it cause to question some of the deeply entrenched adversarial norms, such as the rule against gathering evidence, which hold sway in other courts.

e) The Family Court model does not recognise a presumption in favour of direct engagement

It is perhaps rare that the legal position for children should lead the way for adults, rather than the other way around, but that seems to have been the case here. *Re W* and its non-presumptive balancing exercise have become the starting point for dialogue around issues of participation in both the Family Court and CoP.[153] When the issue of P's *attendance* at CoP hearings was raised recently in *A County Council v AB,* the judgment demonstrated real willingness to facilitate P's participation, noting the Court's ability to hear information from P was 'wide and flexible' and that CoP rules did provide for an 'entitlement to attend'.[154] On the issue of giving 'information,' appearing to mirror the non-presumptive stance of *Re W,* Rogers J in *AB* stated: 'it is nevertheless a balance. There is no presumption, but there seems to be good reason in this case why it is worth having a try and keeping the matter under review.'[155] Likewise, the *Guidelines on Facilitating Participation of P and Vulnerable Persons in CoP Proceedings* regard 'meeting the judge' as a means of encouraging participation, and require that P's views should be sought 'at an early stage' on whether they wish to attend court or meet with the judge,[156] but they are non-prescriptive on the issue of whether the meeting should happen.[157]

This non presumptive approach is an obstacle to realising the perspective taking, empathetic approach to CoP judging envisaged in *Aintree*. Presumptions are valuable devices for legal 'nudging'; they

[153] This may explain why the 'non-presumptive stance' has been applied to forms of participation beyond 'giving evidence'. Shortly after *Re W,* Justice Peter Jackson commented that the presumption of harm to the child caused by *attendance* at the court hearing expressed in earlier cases was flawed and that an open assessment was required: *A City Council v K* [2011] EWHC 1082, [33]. The judgment does seem to creep *closer* to a presumption in favour of attendance if the child wishes it by stating that it would require 'particularly cogent evidence' of psychological harm to the child before a child asking to attend a hearing on their secure accommodation would be excluded ([54]).
[154] *A County Council v AB* (n3), [36] and [49], construing Rule 90.
[155] (emphasis added) [2016] EWCOP 41, [48].
[156] Ibid., [12].
[157] Instead relevant factors are identified, including the purpose of the meeting, seeking the judge's views and identifying relevant risks affecting P visiting court or the judge visiting P.

'exist to foster the functions of the law'[158] and it seems clear that if there is a commitment to promoting increased direct engagement between P and the court, a legal presumption would be one way to support this commitment. Rules which impede P's direct engagement with the court when P wishes it to happen, should be subject to close scrutiny. Likewise, the assumption that the CoP ought to follow in the Family Court's footsteps is highly questionable here. The right to make our own decisions and the right to have our views given weight are far more heavily qualified in the case of children and 'standing in the subject's shoes' has not emerged as a key focus for best interests decision making for children in the same way as it has for adults. If the CoP follows practices developed in the Family Courts too readily, there is an obvious risk of getting locked into a potentially regressive mutually reinforcing cycle.

6. CONCLUSION : THE LIMITS OF FOLLOWING THE PROXIMATE JURISPRUDENCE OF THE FAMILY COURT

Whilst there is an abundance of research internationally dedicated to the intricacies of judges meeting children in family court settings, and a significant body of domestic case law has emerged on the subject and has tested its limits, the practices of judges meeting P in the CoP are under-explored, and case law is minimal. This paper has highlighted that although the therapeutic gains of enabling the subject of litigation to tell their story directly to the decision maker are broadly accepted, it is unclear whether the narrow 'non-instrumental' model of participation applied to judges meeting children, applies equally to P's meetings with the judge in the CoP. The pale, reticent language of s.4(4)'s 'permitting' P's participation, certainly appears to fall short of a right or presumption in favour of a direct voice in best interests decisions.

The post-*Aintree* emphasis on P's 'point of view' in best interests jurisprudence is mere empty rhetoric, if that point of view is obscured by being theoretically or structurally excluded from engaging directly with the decision maker. The limited evidence available suggests that in health and

[158] N. Rescher, *Presumption and the Practices of Tentative Cognition* (CUP, 2006), 11.

welfare cases (where there has been no obvious reason P not to engage directly with the judge) that engagement has happened in less than twenty per cent of cases. It should not, however, be assumed that the rarity of this happening is *necessarily* due to a fundamental unwillingness to facilitate P's participation. Many practical impediments to such engagement are evidenced in the judgments, and it is outside the scope of this article to suggest how the impact of these (e.g. delay) might be minimised. On the specific issue of judges meeting privately with P, a survey of the judgments suggests, however, that the spectre of the gathering evidence rule (as applied to judges meeting children) may well have played a part in deterring such meetings from taking place.

Caldwell observed that the 'culture of the court system will be highly influential' in determining the extent to which judges meet with children.[159] In the CoP this culture is made up of, not only the judiciary and their clerks, but also the Official Solicitor and lawyers (many of whom have substantial experience of family law cases) who frame the case in the courtroom. Although the jurisdictional and cultural proximity of these jurisdictions has resulted in a tendency to model CoP practices on procedures adopted in relation to children, there are compelling reasons to rethink matters when it comes to judges meeting with P. The 'gathering evidence' rule is built in part upon a fiction that judges can cordon off certain information when making their decisions. Whilst the fiction may have value in supporting adversarial norms, its application should not be over-extended. Further, application of the rule to the two stages of CoP proceedings creates its own complications which tend to obscure the meaningful engagement of P by postponing meetings with the judge until a late stage in the process.[160] The gathering evidence rule and its distinction between meetings for forensic *vs* non forensic purposes may make sense in a highly adversarial context, but it conflicts with the mode of CoP hearings which is distinctly inquisitorial and seeks to look at things from P's 'point of view'. The strenuous efforts undertaken to understand P's values and preferences through the conduit of friends and family when P is currently unconscious[161], make it even more anomalous that P has not routinely

[159] J. Caldwell, (n13) 60.
[160] The extent to which these arguments might suggest that the rules need to be revisited in respect of the Family Court is outside the aims of this paper.
[161] For two examples of many, see *Re P* [2017] EWCOP B26; *Sheffield Teaching Foundation Hospital NHS Trust v TH* [2014] EWCOP 4 – family providing the 'authentic voice' of P.

met with the judge when they are fully conscious. The author agrees with Birchley that in the context of unconscious patients, the court should 'seek as many narrative threads as possible' to ascertain P's perspective[162], but that means that when P is not suffering a disorder of consciousness, the most important 'thread' for ascertaining that perspective is to hear from P directly.

It has been argued here that if P wishes to meet the judge, or indeed, give evidence in their own case, the non-presumptive model from Family Court jurisprudence should be departed from; the starting point should be that they would be allowed to do so, unless the presumption is rebutted by convincing evidence of potential harm. This may very well emerge from future practice in the CoP, but we are far from a definitive statement on the matter.

[162] G. Birchley, 'What God and the Angels know of us?' (2018) Med L Rev (online first) at 25.